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The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2013

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A practical cross-border insight into litigation & dispute resolution work

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Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
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Country Question and Answer Chapters:

Chapter 20

Japan

Naoki Iguchi

Hiroki Aoki

Nagashima Ohno & Tsunematsu

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Japan got? Are there any rules that govern civil procedure in Japan?

Japan is generally categorised as a civil law jurisdiction. The Code of Civil Procedure (Act No 109 of 1996, CCP, *minji-sosho-ho*) and Rules of Civil Procedure (RCP, *minji-sosho-kisoku*) are applicable. Judges are not technically bound by the precedents of the Supreme Court of Japan; however, in reality, judges are likely to follow Supreme Court precedents when deciding similar cases.

1.2 How is the civil court system in Japan structured? What are the various levels of appeal and are there any specialist courts?

The Japanese judicial system has a three-tiered court system comprised of one Supreme Court, being the court of final resort, eight high courts and one intellectual property high court (established in 2005) and 50 district courts. Apart from these, there are 50 family courts and 438 summary courts.

1.3 What are the main stages in civil proceedings in Japan? What is their underlying timeframe?

Except those cases subject to the exclusive jurisdiction of the summary or high court, the district courts, as courts of the first instance, have general adjudicatory authority over civil cases. No rigid timeframe exists; however, it is encouraged by statute that all first-instance proceedings be concluded within two years of its commencement. Having said that, a minimum of one year is usually required from the time proceedings are initiated until a final judgment is rendered, even in relatively simple cases. In complex cases, it is not unusual for this process to take more than two years.

1.4 What is Japan's local judiciary's approach to exclusive jurisdiction clauses?

The parties may agree on an exclusive jurisdiction in writing, and the court generally acknowledges that agreement (CCP Art 3-7 and 11). However, the court may, and actually sometimes does in some consumer cases, transfer an action to another court when it finds it necessary to do so in order to avoid a substantial delay in the proceedings or to ensure equity between the parties. In addition, recent amendments to the CCP restrict certain exclusive international jurisdiction arrangements in consumer and labour cases.

1.5 What are the costs of civil court proceedings in Japan? Who bears these costs?

In principle, the losing party must pay both his/her own litigation expenses and those of the opposing party. The scope of the litigation expenses are described in statute (Art 2 of Act on Cost of Civil Procedure, Act No 40 of 1971) and such expenses include court fees paid in the form of revenue stamps, fees paid to witnesses, expert witnesses and interpreters, and travel expenses paid to such persons. Excluded from litigation expenses are attorneys' legal fees.

1.6 Are there any particular rules about funding litigation in Japan? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

As a contractual matter, attorneys' fees may be freely agreed upon between the attorney and the client. With regard to litigation and other contentious matters, the attorney fee system is historically based on retainer fees and "success fees". A retainer fee is paid, irrespective of the result of the case, when an attorney accepts the case. A "success fee" is payable when the attorney achieves a successful result for his/her client. An attorney and a client may, of course, agree upon a different method of payment, such as, for example, an hourly charge system. Contingent fees are not prohibited in Japan, although pure contingency fees are not frequently used.

1.7 Are there any constraints to assigning a claim or cause of action in Japan? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Parties are free to assign a claim unless a court issues an injunctive order. However, Art 10 of Trust Act (Act No 108 of 2006) prohibits from entrusting a claim for the purpose of litigation proceedings. Although there is no clear precedent, this provision may be applicable to the assignment of a claim or cause of action made for the purpose of undertaking litigation after the commencement of litigation without any justifiable cause. Financing to litigation may be regulated under a similar scheme as assignment. Clearer regulation schemes are expected but not yet discussed among legislators.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

No particular formality exists before commencing civil proceedings.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The statute of limitations (*jiko*) is primarily set out in the Civil Code and Commercial Code, as a substantive law issue. In principle, the statute of limitations for civil claims is ten years (Art 167 of Civil Code), while that for commercial claims is five years (Art 522 of Commercial Code). Various exceptions of shorter limitation periods are listed in the abovementioned Codes or in the other relevant acts.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Japan? What various means of service are there? What is the deemed date of service? How is service effected outside Japan? Is there a preferred method of service of foreign proceedings in Japan?

The procedure for obtaining a judgment begins with the filing of a complaint with the competent court of the first instance. When the plaintiff files the complaint (*sojo*), the plaintiff must pay a court fee of a prescribed amount based upon the value of the claim. After reviewing the complaint for compliance with court requirements, the court will serve the defendant with a copy of the complaint and a summons to appear before the court on a prescribed day in order for the complaint to be heard. The service (*sotatsu*) should be handled by court and a court clerk usually allows a post office clerk to deliver the documents to the home or work place address of the defendant. In the case of service to an overseas defendant, the court performs the delivery through diplomatic channels in accordance with international conventions and bilateral agreements, which usually takes more than several months. Service via courier or direct delivery by a plaintiff is not regarded as a valid method of service.

3.2 Are any pre-action interim remedies available in Japan? How do you apply for them? What are the main criteria for obtaining these?

Provisional seizure (*kari-sashiosae*) or provisional disposition (*kari-shobun*) can be obtained through the proceedings in accordance with the Civil Provisional Remedies Act (Act No 91 of 1989; *minji-hozen-ho*). In principle, a petition for civil provisional remedies must be filed with the court with jurisdiction over the merits of the case or the district court with jurisdiction over the location of the property to be provisionally seized or the disputed subject matter. The petitioner has to prove the existence of his/her legal right which must be preserved and the necessity of such preservation. If the court grants the petition, the petitioner is usually required to provide a certain amount of security, depending on the value of the object to be preserved.

3.3 What are the main elements of the claimant's pleadings?

The complaint must indicate the names and addresses of the parties (and their legal representatives, if any), the remedies sought, and the causes of action.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The plaintiff may amend the claim in writing until oral arguments are concluded, unless there is any change to the basis for the claim and such amendment would substantially delay the proceedings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

Usually a statement of defence (answer; *tobensho*) includes a simple answer to the complaint (i.e., a request to dismiss the case), agreement or disagreement with each of the plaintiff's arguments, and a relevant factual background and legal discussion from the defendant's perspective. If the defendant has arguments on court's jurisdiction, they must be stated in the first answer. The defendant may include a defence of set-off in the answer. The defendant may file counterclaims, which are relevant to the merits of the plaintiff's claim, with the same court by a separate document.

4.2 What is the time limit within which the statement of defence has to be served?

The court determines the time limit for the answer. Depending on the type of case and the court involved, oral proceedings usually begin within a month or so after the filing of the complaint. The answer is usually requested to be submitted one week before the first oral proceeding.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

While a suit is pending, a party may give a notice of the suit to a third party who has an interest and may intervene in the suit (CCP Art 53, *sosyo-kokuchi*). When the notice is given, that third party shall be deemed to have intervened in the suit even when the third party does not actually intervene, which means that the judgment of the suit shall be effective against that third party as well.

4.4 What happens if the defendant does not defend the claim?

The defendant shall be deemed to have admitted the facts in the complaint.

4.5 Can the defendant dispute the court's jurisdiction?

Yes. Provided, however, that the defendant must file a defence of lack of jurisdiction before presenting his/her oral arguments on the merits.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party who has a legal interest in the outcome of a suit may intervene (*sanka*) in the suit in order to assist either party. The court will decide whether the third party may intervene in the suit only when one of the parties files an objection (otherwise the court grants the intervention automatically).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Subject to the court's discretion, the consolidation (*heigo*) of two sets of proceedings may be allowed as long as: the two proceedings are of the same kind; consolidation is not legally prohibited; and the court has jurisdiction over both proceedings. If the two sets of proceedings involve different parties, the court will take into account whether the rights or obligations that are the subject matter of the suits are common or of the same kind to that party, or if they are based on the same kind of factual or legal cause.

5.3 Do you have split trials/bifurcation of proceedings?

The court may order the separation (*bunri*) of oral arguments. The court may make an interlocutory judgment with regard to an independent point of dispute in a suit when the suit is ripe for making such judgment.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Japan? How are cases allocated?

Cases are allocated by the court based on the jurisdiction stipulated in the CCP and the court's internal assignment rule.

6.2 Do the courts in Japan have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court has wide discretion over case management in general, although the court usually asks both parties if it is acceptable to them prior to making any decisions. In principle, the parties may make a petition to facilitate the court exercising this kind of discretion when it is appropriate without any cost.

6.3 What sanctions are the courts in Japan empowered to impose on a party that disobeys the court's orders or directions?

There are no sanctions such as contempt of court in Japanese courts; however, the parties usually obey court orders voluntarily so as not to give the court a bad impression.

6.4 Do the courts in Japan have the power to strike out part of a statement of case? If so, in what circumstances?

The court may dismiss delayed submissions (i.e., statements and/or evidence) when it finds that parties intentionally or with gross-negligence caused such delay (CCP Art 157). The court may strike out the statements and/or evidence in case where a party seriously abused their right.

6.5 Can the civil courts in Japan enter summary judgment?

There is no summary judgment system.

6.6 Do the courts in Japan have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court will order a (a) discontinuation, or (b) stay of proceedings under certain limited circumstances, such as (i) loss of capacity, or (ii) impossibility of performance of duties by the court due to a natural disaster.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Japan? Are there any classes of documents that do not require disclosure?

There is no concept of disclosure as used in common law jurisdictions. Instead, CCP allows a party to the court to order another party to produce particular documents (CCP Art 221). The holder of documents is widely obliged to submit documents as long as such documents are prepared as to a legal relationship between the parties (CCP Art 220, Subparagraph 3). CCP discharges the holder's obligation in limited circumstances like: (a) a document is prepared exclusively for use by the holder (Subparagraph 4(iv)); and (b) a document concerning a secret in relation to a public officer's duties, which is, if submitted, likely to harm the public interest or substantially hinder the performance of his/her public duties (Subparagraph 4(ii)). Consequently, most of the documents for internal decision-making are out of the scope of obligation. As to the other dischargeable cause, please see question 7.2.

7.2 What are the rules on privilege in civil proceedings in Japan?

There is no concept of privilege as used in common law jurisdictions. Instead, CCP discharges the holder's obligation if an attorney and/or other professionals (i.e., medical doctor, patent attorney, etc.) whose confidential obligation are not discharged (CCP Art 220, Subparagraph 4(iii)). This is in accordance with the professional's right of refusal of testimony (CCP 197). However, it should be noted that, although attorneys are likely to be discharged from document production liability based on the abovementioned provision, the system does not give a basis of client's right, unlike attorney-client privilege in common law jurisdictions.

7.3 What are the rules in Japan with respect to disclosure by third parties?

Under CCP, document production obligation is applicable not only to parties but also to "document holders (*bunsho-no-shojisha*)".

Accordingly, even a third party should be subject to document product obligation unless there is any dischargeable basis.

7.4 What is the court's role in disclosure in civil proceedings in Japan?

Upon party's request, it is the court which orders document holders to submit particular documents (CCP Art 223; *bunsho-teishutsu-meirei*). The court examines whether the request specifies particular documents sufficiently and appropriately, and whether the holders and/or documents are discharged. In case of a third party, the court should hear her/his opinion (CCP Art 223, Paragraph 2).

7.5 Are there any restrictions on the use of documents obtained by disclosure in Japan?

Generally, there is no restriction on the use of documents. However, in particular circumstances, parties are obliged to keep their information confidential by court's "protective order (*himitsu-hoji-meirei*)" (Art 105-4 of Patent Act, Act No 210 of 1959).

8 Evidence

8.1 What are the basic rules of evidence in Japan?

There is no independent statute for evidence rules. Evidence rules are incorporated in CCP and RCP. The basic principle of evidence rule is that judges shall decide whether or not the facts are true without particular restriction on credibility, unless specifically provided by the statues. Since Japan does not hire jury system in civil and commercial litigation, the court has a wide discretionary power on evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

All kinds of evidence including testimony by witness and parties, expert opinion (*kantei*), documents, and court's inspection (*kensho*) are admissible to court examination.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

The court decides the calling of witness, considering the necessity of particular witnesses (CCP Art 181). Usually, witnesses are called only after the court's examination on documentary evidence, and, therefore, smaller numbers of witnesses are called, compared with common law jurisdictions. There is no deposition system. Parties usually prepare and submit witness statements (*Chinjutsu-sho*) as documentary evidence; however, they are deemed to be documentary evidence and not equivalents to witness' testimony. Practically, witness statements work as introductory information for judges preparing witness examination.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Parties are free to retain their expert to provide its opinion as written evidence. Some party-appointed experts are called as witness in later stages. There are no rules applicable to the instruction to expert witnesses; however, a biased instruction to the expert is likely to harm the credibility of its opinion. Court-appointed experts are to be instructed by the court. Court-appointed experts should be neutral and they may be challenged if there is any challengeable cause (CCP Art 214).

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Japan?

The court takes a central position in evidence examination. It determines the necessity of particular evidence procedures; it determines the necessity of calling particular witness, and conducts witness examination hearings; it determines the necessity of ordering document holders to produce documents; it examines challengeable cause of expert opinion; it makes an evaluation on the credibility of all evidence.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Japan empowered to issue and in what circumstances?

The court provides its final determination on merits and/or jurisdiction by final/interim judgments. The court renders orders for procedural issues including documents production, calling of witness, and consolidation.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Damages should be determined by the court. Contrarily, the court is not empowered to determine interests because interests should be fixed by parties and/or other statutes like Civil Code. Lastly, the courts decide an allocation of costs of the litigation and the secretariat of the court decides an actual amount of the costs. Attorney's fees are not included in the cost of litigation.

9.3 How can a domestic/foreign judgment be enforced?

Judgments rendered by Japanese courts are generally enforceable once they are finalised. Enforcement procedures are set forth in the Code of Civil Enforcement (Act No 4 of 1979). Foreign judgment has to be approved by the Japanese court before its enforcement, if it meets the requirements of: (i) legitimate jurisdiction of the foreign court; (ii) due process; (iii) no offence to public policy in Japan; and (iv) reciprocity (CCP Art 118).

9.4 What are the rules of appeal against a judgment of a civil court of Japan?

Appeal to High Court is generally allowed in Japan; a losing party may appeal based on legal and factual issues. Basically, High Courts do not restrict parties from making new submissions, i.e., allegations and evidence. On the contrary, parties need to find special reasons, i.e., violation of the Constitution, in order to appeal to the Supreme Court.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Japan? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Various kinds of ADR are allowed in Japan including arbitration (*chusai*) and statutory mediation (*chotei*). Requests for statutory mediation should be made to appropriate courts, and the courts assist procedures.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration Act (Act No 138 of 2003) and Civil Mediation Act (Act No 222 of 1951).

1.3 Are there any areas of law in Japan that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration can be used only for disputes which parties can settle by amicable settlement (Art 13 of Arbitration Act). Generally speaking, any disputes which may legally influence third party's interest may not be settled by arbitration and mediation. Although the Arbitration Act clearly has taken pro-arbitration position, it is unfortunate that an exact scope of arbitrability is still vague in Japan due to lack of clear court precedents.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Japan in this context?

As for evidence taking, the Arbitration Act empowers the court to assist arbitral tribunal's and party's taking of evidence if arbitral tribunal finds it necessary (Art 35 of Arbitration Act). The means of evidence taking includes entrustment of investigation (*chosa-no-shokutaku*), examination of witnesses and expert testimony, investigation of documentary evidence and inspection. As for an order to arbitrate, Japanese courts only dismiss the complaint if they find valid arbitration agreement, and do not refer the case to arbitration directly.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Japan in this context?

As to arbitration, an arbitral award is final and binding like final judgment (Art 45 of Arbitration Act). The arbitral award may be set aside only by the limited grounds set forth in the Arbitration Act and those grounds are the same as those in UNCITRAL Model Law. As to mediation, once parties agree to mediator-proposed terms, such terms should be binding and enforceable like arbitral awards. Although non-statutory mediation are allowed and used in commercial disputes, terms agreed by the parties do not work as writs of execution, unless they are registered to court or public notary. Since mediation is not a mandatory dispute resolution system, refusing parties may not be sanctioned.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Japan?

The Japan Commercial Arbitration Association (JCAA) and Tokyo Maritime Arbitration Commission of Japan Shipping Exchange (TOMAC) are popular for international/domestic commercial arbitration. Local bar associations are frequently used for domestic small claims and sometimes used for international commercial claims. ADR FINMAC (established in 2010) and other associations of financial institutions have been taking more investor disputes.

2.2 Do any of the mentioned alternative dispute resolution mechanisms provide binding and enforceable solutions?

Arbitration and statutory mediation provide binding and enforceable solutions. See question 1.5.

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

"Escaping from any kinds of dispute resolution procedure" had been a typical action patter of Japanese companies. Accordingly, they prefer to incorporate "symmetrical" dispute resolution clause: a party to start dispute resolution procedure needs to go to counterparty's home ground. By such a clause, they hoped they were not sued by the counterparty. However, considering the increasing importance of cross-border transactions, they are changing their mind to take a more effective dispute resolution mechanism.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those alternative dispute resolution methods in Japan?

A number of persons who share common interests may appoint, from among them, one or more persons as parties to represent their interests as plaintiffs or defendants. However, this system is rarely used. The government of Japan is currently considering introduction of a new mechanism (a kind of "class action" system) for cases involving collective consumer disputes.

Naoki Iguchi

Nagashima Ohno & Tsunematsu
Kioicho Building, 3-12 Kioicho, Chiyoda-ku
Tokyo 102-0094
Japan

Tel: +81 3 3511 6755
Fax: +81 3 5213 7443
Email: naoki_iguchi@noandt.com
URL: www.noandt.com/en

Naoki Iguchi is a partner of Nagashima Ohno & Tsunematsu. Before joining Nagashima Ohno & Tsunematsu, he graduated from Stanford Law School (LL.M., 2006) and had been a partner of Anderson Mori & Tomotsune for three years. He specialises in arbitration and commercial litigation, principally in the areas of international joint-venture, construction, project finance and management, distributorship, M&A disputes, securities, antitrust, employment and bankruptcy and reorganisation. His language proficiency extends to Mandarin and Spanish, as well as English. He also advised many Japanese companies in cooperation with foreign attorneys abroad, numerous Japanese companies, such as large banks and manufacturers, on litigation and arbitration abroad, including document discovery and depositions.

Hiroki Aoki

Nagashima Ohno & Tsunematsu
Kioicho Building, 3-12 Kioicho, Chiyoda-ku
Tokyo 102-0094
Japan

Tel: +81 3 3511 6390
Fax: +81 3 5213 5903
Email: hiroki_aoki@noandt.com
URL: www.noandt.com/en

Hiroki Aoki is an associate at Nagashima Ohno & Tsunematsu. He specialises in litigation and arbitration of a wide variety of commercial disputes (especially international disputes). He is a graduate of University of Tokyo (LL.B., 2000) and University of Michigan (LL.M., 2004). Before joining Nagashima Ohno & Tsunematsu in 2007, he worked for Government of Japan (Ministry of Land, Infrastructure and Transport) from 2000 to 2006.

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GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk